October, 1992

HONOR ROLL

391st Session, Basic Law Enforcement Academy - June 3 through August 21, 1992

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Best Mock Scenes: *Officer David B. Smith - Seattle Police Department*

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WASHINGTON STATE SUPREME COURT

OMISSION OF CERTAIN FACTS FROM AFFIDAVIT NOT FATAL TO SEARCH WARRANT

State v. Garrison, 118 Wn.2d 870 (1992)

Facts: (Excerpted from Supreme Court per curiam opinion)

> Over a period of a month, defendant, her mother, and the check-writing boyfriend, Nichols, obtained about $10,000 worth of merchandise by passing more than 100 checks. They obtained various personal items such as women's and children's clothing, children's toys, children's bicycles, household furnishings, rings, and liquor. Many of the items were Christmas gifts for defendant's children.
>
> A Port Orchard police detective began investigation when the bad checks surfaced. He confirmed the status of the closed, no-funds account, obtained the various returned checks, and acquired descriptions of the merchandise, defendant, her mother, and the check-writing boyfriend, Nichols.
>
> Nichols contacted the police and admitted to the criminal activity, implicating defendant and her mother. The detective's subsequent investigation confirmed Nichols' statements. A few days later Nichols voluntarily returned and gave a 45-minute taped interview with Detective Jensen, who prepared the warrant affidavit. Nichols no longer lived with defendant, her children, and her mother. Nichols had helped them move to a mobile home, the site of the search as authorized by the warrant. The subject merchandise had been moved to that location. After this interview Detective Jensen drive by the identified mobile home, and observed children and new children's bicycles there.
>
> Detective Jensen submitted a 37-page affidavit detailing each transaction with a specific description of the merchandise obtained. He listed 89 specific items of merchandise and their source. He expressed the belief that, because of the personal nature of much of the merchandise, e.g., women's and children's clothes, and the fact that much of it was Christmas gifts to the children, it would be located at the mobile home residence of defendant, her children, and her mother.

Proceedings:

Arletta Garrison was charged with 14 counts of theft. She moved to suppress the evidence seized under the search warrant, arguing that affiant-officer Jensen had omitted important information

from the affidavit. The asserted omission consisted of the information contained in the following transcript of two question-and-answer sessions between Jensen and Mr. Nichols --

> Jensen: Oh, okay, so Amy and Gary live in that trailer and Arletta and Olia also do but are going to be moving out.
>
> Nichols: Yeh, till they find a house to live.
>
> Jensen: Do you know it they found one?
>
> Nichols: I don't know if they did because last time when I told them my aunt wanted to turn myself inn and I told her yes I will and my cousin took me down to their place to get my clothes and my things. They took mostly all of the stuff, all the stuff they bought and I guess they moved it out, sent it to another house I guess and most of the stuff is gone.
>
> Jensen: Where do you think it is?
>
> Nichols: I don't know. They didn't mention where they were going to move to. Because mostly every night Olia Gunderson been looking in the ads for houses to rent, you know.

The Superior Court denied the motion, and defendant was convicted on all 14 counts. On appeal, the Court of Appeals for Division II ruled in an unpublished opinion that the search warrant was invalid.

ISSUE AND RULING: Was the omission of the referenced information fatally defective to the search warrant? (ANSWER: No) Result: Court of Appeals' ruling reversed; Kitsap County Superior Court convictions (14 counts) of theft affirmed.

ANALYSIS: (Excerpted from Supreme Court per curiam opinion)

> Defendant's challenge falls far short of what is required. The seminal case is Franks v. Delaware, 438 U.S. 154 (1978). The Court held that where
>
> > defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.
>
> The Franks test for material misrepresentations applies to allegations of material omissions. State v. Cord, 103 Wn.2d 361 (1985)**[April '85 LED:10]**.
>
> The Franks opinion is clear that there must be allegations of deliberate falsehood [or deliberate omission] or of a reckless disregard of truth. Allegations must be accompanied by an offer of proof. Also, "[a]llegations of negligence or innocent mistake are insufficient."

If these requirements are not met the inquiry ends. If these requirements are met, and the false representation or omitted material is relevant to establishment of probable cause, the affidavit must be examined. If relevant false representations are the basis of attack, they are set aside. If it is a matter of deliberate or reckless omission, those omitted matters are considered as part of the affidavit. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing.

To prove reckless disregard of the truth, as is defendant's burden, defendant relies solely on State v. Jones, 55 Wn. App. 343 (1989) **[Jan. '90 LED:07]** which seems to hold that an inference of reckless disregard must be made from the omission of facts "clearly critical to a finding of probable cause".

Relying on such an inference to establish reckless disregard is not proper. . . . "[S]uch an inference collapses into a single inquiry the two elements -- 'intentionality' and 'materiality' -- which Franks states are independently necessary."

Defendant failed to prove anything about reckless disregard for the truth by the omission, except the content of the omission. That is insufficient. In any event, even if the omitted material were contained in the affidavit, it would not defeat the establishment of probable cause. All it suggests is that if defendant and her mother had found another place to live then the informant "guessed" they would have moved the items with them. It is clear that the informant did not know whether they had moved. The affidavit sets forth sufficient statements of the detective's investigation, subsequent to the recording, leading him to believe defendant still lived at the mobile home. Given a reasonable belief that defendant still lived at the mobile home, the omitted material supports the belief that these personal items would still be there. Judge Hanley, in denying the motion, accurately observed:

> The types of material sought were, as the State argues, the type normally to be used by or in the proximity to defendant and her family. It seems at least as logical for the officer seeking the search warrant to believe that they would be found rather than rely upon the "belief" of the informant. There is no sufficient showing that the omission was made intentionally or with reckless disregard for the truth.

One additional observation is necessary. The Court of Appeals stated that the omitted statement vitiated the search warrant because it "tends to negate probable cause". That is not the proper inquiry. The challenged information must be necessary to the finding of probable cause. The Court of Appeals' statement confuses materiality or relevance as it relates to establishment of bad motive with the separate inquiry whether the information is necessary to the probable cause determination. A court finding "materiality" in the sense that an omission may be said to rise to the requisite level of misrepresentation under Franks

> may think it has made the second Franks finding and may invalidate a warrant after concluding only that the additional information might have affected the probable cause determination and not that the supplemented warrant could not have supported the existence of probable cause.

The Court of Appeals is reversed; the judgment and sentence are affirmed.

[Some citations omitted]

LED EDITOR'S COMMENT:

While we see no significant error in the officer-affiant's work here, we would suggest the following rule of thumb -- when in doubt as to the materiality of certain facts, include the facts in your affidavit, or at least consult your prosecutor's office on the matter.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) **STATE NEED NOT PROVE ACT OF PROSTITUTION TO PROVE CRIME OF PERMITTING PROSTITUTION --** In State v. Johnson (Janice Ann), 119 Wn.2d 167 (1992) the State Supreme Court rules, 6-3, in favor of the State in a case which arose out of a sting operation where the police believed the owner/operator of the hotel was permitting prostitution activity to occur in the hotel.

The majority holds that under RCW 9A.88.090, which defines the crime of permitting prostitution, the State may use a sting operation utilizing decoy "prostitutes" and need not prove that an actual act of prostitution occurred in order to establish defendant's "knowledge" that his or her premises were being used for prostitution. The majority holds that the trier of fact is permitted to find "knowledge" of prostitution activity by the defendant if there is sufficient evidence presented to lead a reasonable person to believe that: (a) defendant actually believed the premises were being used for prostitution and (b) such belief was reasonable based on the facts then known to defendant. Result: King County Superior Court conviction for permitting prostitution affirmed.

(2) **BANK SURVEILLANCE COSTS MAY BE INCLUDED IN BURGLARY RESTITUTION ORDER --** In State v. Smith (Joseph D.), 119 Wn.2d 385 (1992) the State Supreme Court holds that the trial court acted lawfully in including a restitution order in sentencing Smith for second degree burglary. Defendant had argued unsuccessfully that RCW 9.94.142(1), the statute which authorizes a sentence of restitution, did not allow the bank to be reimbursed for its expenditures for labor and supplies needed to (a) unload and develop film in its surveillance cameras, (b) reload the film, and (c) reset the surveillance cameras. Result: Court of Appeals reversed; Grays Harbor County Superior Court convictions and sentences for two second degree burglaries affirmed.

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WASHINGTON STATE COURT OF APPEALS

APARTMENT DUMPSTER SEARCH DOES NOT VIOLATE PRIVACY RIGHT OF VISITOR

State v. Rodriguez, 65 Wn. App. 409 (Div. III, 1992)

Facts and Proceedings:

Police responding to a report of a stabbing followed their leads t the home of Lilly Rodriguez where they hoped to find their suspect, Lilly's son, Jose R. Rodriguez. She consented to a search of her apartment for Jose. The Court of Appeals describes as follows the evidence regarding Jose's right of privacy, or lack thereof, in the apartment:

> Ms. Rodriguez testified her son got out of prison on Friday and slept on her living room floor that night. He was arrested early Sunday morning. When asked if she expected him to live with her, Ms. Rodriguez said she did not know and could not say.

When the officers came to a closed bathroom door, they knocked and asked if anyone was inside. No one answered, but when the officers opened the bathroom door, they found their suspect sitting on the toilet. Jose was placed under arrest, and certain items in plain view in the apartment were seized. Thereafter, the officers went outside the apartment to search. Their continued search is described in part by the Court of Appeals as follows:

> Assistant Chief Martinez testified Chief Charvet went directly to a 300-gallon garbage receptacle located about 30 feet south of the apartment, shined his light in it, and removed a blue bag from the top of the pile. There was blood on the side of the bag. Chief Charvet opened it and found letters addressed to the victim and a plastic hospital bracelet with the victim's name on it. He testified the container served the apartment complex in which Ms. Rodriguez lived.

Defendant was charged with and convicted of first degree assault.

ISSUES AND RULINGS: (1) Did defendant have privacy rights in the bathroom of his mother's apartment such that she could not consent to a search of that room? (ANSWER: No); (2) Did the warrantless search of the dumpster violate defendant's right to privacy under the Washington constitution? (ANSWER: No) Result: Yakima County Superior Court conviction for first degree assault affirmed. Status: decision final.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Third Party Bathroom Privacy

> Defendant contends he had a right to expect privacy in his mother's bathroom, a right separate from the privacy right which his mother enjoyed. According to defendant, although his mother could give consent to a search of other rooms in the apartment, she could not validly consent to a search of the bathroom so long as he was in it. He cites as authority State v. Berber, 48 Wn. App. 583 (1987).
>
> The State contends the warrantless search of the apartment was constitutional because Ms. Rodriguez gave a valid consent and the search of the bathroom was within the scope of that consent. We agree.

Defendant's reliance on Berber and its particular facts is misplaced. Berber does not stand for the proposition that anyone in a bathroom can expect special privacy rights that will take precedence over other rights to search. In Berber, the issue was whether defendant had a reasonable expectation of privacy in a public bathroom. The court said he did. **[LED EDITOR'S COMMENT: Actually, the Court in Berber held that Mr. Berber did not have a right of privacy because he was located in an unenclosed area of a tavern restroom when he was observed snorting cocaine. Privacy protection is afforded generally only in enclosed areas of such a public restroom, i.e., an enclosed toilet stall. See Tukwila v. Nalder, 53 Wn. App. 746 (Div. I, 1989) Sept '89 LED:17]** Here, the issue is whether defendant had a reasonable expectation of privacy in the home where he was apprehended.

Minnesota v. Olson, 495 U.S. 91 (1990) **[June '90 LED:02]** held an overnight guest has a legitimate expectation of privacy in his host's home, an expectation which is not inconsistent with the host's ultimate control and right to admit or exclude others. Here, Mr. Rodriguez had the right to expect privacy in his mother's home, not just in the bathroom. However, since he was only sharing the home, his expectation was not absolute. A host or third party who has dominion and control over the premises may consent to a search, whether it is for purposes of arrest or seizure of evidence. . . . *[COURT'S FOOTNOTE: State v. Leach, 113 Wn.2d 735 (1989) **[Feb. '90 LED:03]** is distinguishable because Leach was not an overnight guest or even a temporary resident, but a cohabitant with equal or greater control than the other person occupying the premises. Leach, at 744, held:*

> *Where the police have obtained consent to search from an individual possessing, at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent. However, should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent.]*

Here, Mr. Rodriguez was apparently a temporary guest in his mother's home. Although he had an expectation of privacy, that expectation was qualified by the possibility his mother would consent to a search of her apartment. The trial court found she did. Therefore, the police officers' search for and arrest of Mr. Rodriguez was constitutional.

(2) Dumpster Privacy

The pertinent facts of Boland **[State v. Boland, 115 Wn.2d 571 (1990) Jan. '91 LED:02]** are simple. Brad Boland lived in a single family residence. He placed his trash in his personal trash can, secured the lid, and put it on the curb in front of his home for collection. Police began a series of four warrantless searches of Boland's garbage, attempting to obtain sufficient evidence for a warrant to search his home. Given these facts and having determined that review was to be conducted on independent state grounds, the Boland majority concluded,

> defendant Boland's private affairs were unreasonably intruded upon . . .. Boland's trash was in his can and sitting on the curb in expectation that it

> would be picked up by a licensed garbage collector. This leads us to the conclusion that it falls squarely within the contemplated meaning of a "private affair".

Boland, 115 Wn.2d at 578. And, under article 1, section 7 of the Washington Constitution, the issue "is whether the 'private affairs' of an individual have been unreasonably violated rather than whether a person's expectation of privacy is reasonable". Boland, 115 Wn.2d at 580.

At the outset, the Boland majority acknowledged that under the fourth amendment to the United States Constitution, no reasonable expectation of privacy exists in garbage left on the curbside for collection. **[LED ED.: See California v. Greenwood, 100 L. Ed.2d 30 (1988) July '88 LED:12]** However, once the court established that the criteria in State v. Gunwall, 106 Wn.2d 54 (1986) were met, the majority determined the privacy interests at issue were to be examined under state constitutional protections, not the less protective federal constitutional protections. Unlike Greenwood, Boland does not make the location of one's garbage "outside the curtilage of the home" determinative of its protection.

Under the facts of this case, however, Boland is not dispositive. Here, the private affairs of an individual have not been unreasonably violated. Mr. Boland had collected his garbage during normal usage at his household, put it in his personal garbage can, and placed the can out on the curb in front of his home. Under the court's ruling, it was still part of his private affairs and constitutionally protected. Here, however, a bag is thrown on top of a 300-gallon garbage receptacle, which is the community dumpster for an apartment complex. It is not garbage ordinarily accumulated in a household, but rather is stolen property defendant is apparently attempting to hide. Under these circumstances, any expectation of privacy or expectation of nongovernment intrusion was unreasonable. See State v. Jeffries, 105 Wn.2d 398 (1986) which held a criminal defendant does not have a reasonable expectation of privacy in items hidden out of doors on property he does not own. Therefore, we conclude the court did not err in refusing to suppress the bag taken from the garbage receptacle.

[Footnotes, some citations omitted.]

MIP CONVICTION SUPPORTED BY BEER BREATH, EMPTY BEER BOTTLES, ADMISSIONS

State v. Preston, ____ Wn. App. ____ (Div. II, 1992)

Facts: (Excerpted from Court of Appeals opinion)

> On July 25, 1989, deputy sheriff Edwin Knutson was patrolling a Pierce County lake-front park and observed Preston putting a brown paper bag into a trash receptacle. After finding that the bag was full of empty beer bottles, Officer Knutson followed Preston to a large group of young people standing by the lake. Preston then took off his shirt, entered the water and swam past the boundaries of the swimming area, ignoring Officer Knutson's command to stop.

About 15 minutes later Officer Knutson saw Preston coming out of a private driveway. Upon seeing Officer Knutson, Preston ran back to the lake. Apparently after realizing that he was too tired to swim away, Preston returned to shore and spoke with Officer Knutson. Officer Knutson noticed the scent of alcohol on Preston's breath and read him his Miranda rights. At that time, Preston informed Officer Knutson that he had consumed only a few of the beers, not all the bottles he threw away, and that he ran away because he was scared. Officer Knutson took Preston home and placed him in his father's custody.

Proceedings:

Preston was convicted of consumption of alcohol in juvenile court.

ISSUE AND RULING: Was there sufficient evidence to convict Preston of consumption of alcohol under the MIP statute? (ANSWER: Yes) Result: Pierce County Juvenile Court MIP conviction affirmed. Status: petition for review pending.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Preston contends that there was insufficient evidence to convict him for "consuming" alcohol under RCW 66.44.270(2). RCW 66.44.270(2) provides:

> (2) It is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor.

According to Preston, because the arresting officer did not actually see him consume beer, there was insufficient evidence to convict him of the crime of consuming alcohol.

Preston cites State v. Hornaday, 105 Wn.2d 120 (1986)**[April '86 LED:15]**, for the proposition that in order to be convicted of the crime of consuming alcohol, the arresting officer must observe the minor consuming the alcohol. In Hornaday, a police officer arrested a minor for consumption of alcohol because the minor appeared to be intoxicated and smelled strongly of alcohol. The court reversed, holding that the arresting officer did not see the crime committed in his presence, thus the arrest was invalid.

Preston's argument fails to recognize that the basis for the court's decision in Hornaday was the statutory requirement that a warrantless arrest for a misdemeanor may be made only when the offense was committed in the presence of the arresting officer. Under this statute at the time of Hornaday, there was no exception to this requirement for the consumption of alcohol by a minor [and the Hornaday Court pointed this out] . . ..

The Legislature heeded the advice of the Hornaday court and amended the statute in 1987 so that it read as follows:

> A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in

> the presence of the officer, except as provided in subsections (1) through (8) of this section.
>
> (1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor . . . involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under 66.44.270 shall have the authority to arrest the person.

RCW 10.31.100. The statute contained this amendment at the time Preston was arrested for consuming alcohol on July 25, 1989.

Preston asserts that other language in the Hornaday opinion supports his contention that an arresting officer must see the minor drinking the alcohol in order for there to be sufficient evidence to support a consumption conviction under RCW 66.44.270. In response to the State's contention that "consumption" was an ongoing process, the Hornaday court opined

> . . . the State's interpretation of "consume" as an "ongoing process" is improper. Consider the situation where a 20-year-old minor journeys into Idaho or British Columbia where the legal drinking age is 19 and there imbibes intoxicating liquor. Under the statutory interpretation urged by the State, probable cause to arrest the same 20-year-old for violation of RCW 66.44.270 exists if he returns to the state of Washington with any trace of liquor still present in his body. Thus, although he did not drink any intoxicating liquor within this state, he might still be subject to arrest for "consuming" liquor in the presence of a police officer who happened to notice his condition or who smelled alcohol on his breath. . . . The Legislature could not have intended such a result in those instances.

Hornaday, at 129. This language does not, as Preston contends, set forth a rule that a minor may not be convicted of consuming alcohol where the arresting officer did not see the minor consume the alcohol. Rather, this portion of the opinion illustrates the absurdity of defining the word "consume" so as to encompass the metabolization of alcohol in the body. The Hornaday court clearly did not intend to require, as a matter of law, that in order to convict a minor for consumption of alcohol the arresting officer must testify that the minor consumed alcohol in his presence.

The relevant inquiry when determining whether there was sufficient evidence to sustain a criminal conviction is "whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." In addition to the odor of alcohol on Preston's breath, the arresting officer testified that he saw Preston put empty beer bottles in the trash receptacle. Even more importantly, after Preston was read his Miranda rights, he confessed to the officer that he had drunk a number of the beers. In this case there was clearly sufficient evidence to support a conviction for the crime of consumption of alcohol by a minor.

LED EDITOR'S NOTE:

Preston also challenged on equal protection constitutional grounds the state statutes (RCW 66.44.270 and 46.20.265) under which his MIP conviction automatically triggered the revocation of his driver's license. The Court rejects his challenge, finding a rational basis for the distinction in the law between those who are 18 years of age or older and those who are younger than 18.

HOUSE GUEST COULD NOT CONSENT TO POLICE ENTRY TO ARREST RESIDENT

State v. Ryland, 65 Wn. App. 806 (Div. I, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals decision)

> On July 26, 1989, a burglary was committed at Highline High School. One of the suspects arrested at the scene alleged that Ryland had been involved. The following morning, on July 27, 1989, a plainclothes police officer went to Ryland's apartment and knocked on the door. A house guest, who was a friend of Ryland's roommate and had spent the night on the living room couch, answered the door. The officer asked to see Ryland and was allowed entry. According to the officer, Ryland then came out of a back room; the officer identified himself, arrested Ryland for investigation of burglary, and escorted him to the precinct for questioning. Upon questioning, Ryland initially denied knowing of the burglary and "then admitted his involvement".
>
> On August 23, 1989, Ryland was charged with second degree burglary. Prior to trial, he moved to suppress his post-arrest statements on the grounds his arrest was unlawful, since the officer's entry into his home for the purpose of arrest, absent a showing of valid consent, violated the Fourth Amendment. The trial court denied the motion, and Ryland was subsequently convicted by a jury of second degree burglary.

ISSUE AND RULING: Did the house guest have authority to consent to the officer's entry in Ryland's residence? (ANSWER: No, rules a 2-1 majority.) Result: King County Superior Court second degree burglary conviction reversed. Status: petition for review pending.

MAJORITY'S ANALYSIS: (Excerpted from majority opinion)

> It is undisputed that the arresting officer entered Ryland's residence without a warrant with the intent to arrest Ryland. Absent valid consent, this practice has been condemned by both the United States and Washington Supreme Courts. . . . However, a warrantless arrest based on a consensual entry is permitted under Payton and the relevant Washington authorities.
>
> The issue in this case is whether the "house guest" had the requisite authority to consent to the officer's entry. We find that he did not and, therefore, the trial court erred by failing to suppress the fruits of the evidence seized by the warrantless arrest (i.e., the confession). The State urges this court to adopt the "apparent authority" doctrine enunciated in the United States Supreme Court case of Illinois v. Rodriguez, 497 U.S. ___ (1990)**[Aug. '90 LED:08]**. In Rodriguez, the police

were summoned to a residence where the owner's daughter showed severe signs of beating. She stated that she had been assaulted by Rodriguez in "an" apartment and that Rodriguez was now at the apartment asleep. She then consented to going to the apartment with the officers to unlock the door with her key so that the officers could arrest Rodriguez. During this time, the victim referred to the apartment as "our" apartment and said that she had clothes and furniture there. It was unclear whether she indicated that she currently lived at the apartment or only that she had lived there in the past. The fats showed that she had moved out a month prior to the arrest but had left some of her furniture and clothes. The Court went on to hold that even if the person allowing entry did not have authority to consent, the entry may be validated if the officers "reasonably believe" that the person does have authority. . . . The Court then remanded the case to determine whether the officers reasonably believed that the person had the authority to consent.

We find that Rodriguez is distinguishable on its facts. In Rodriguez, the third party granting consent not only had a house key, but referred to Rodriguez's apartment as "ours" and had furniture and clothes in the apartment. This was enough for the Supreme Court to find that a factual issue was raised as to whether the officers "reasonably believed" that she had authority to consent. No such facts exist in this case. Here, the arresting officer encountered a man at the door who allowed the officer to enter when he asked to see Ryland. Even though the entry was early in the morning and the unidentified guest who answered the door appeared to have been sleeping on the couch, we believe that these facts would not "warrant a man of reasonable caution in the belief that the consenting party had authority over the premises" and, therefore, they do not meet the threshold which the court in Rodriguez held allowed for remand. There are no facts similar to those found in Rodriguez which would indicate that the police could have reasonably determined that the "house guest" had common authority over the premises.

Since there was no reason justifying the officer's failure to secure an arrest warrant, the confession, obtained as the result of an improper warrantless arrest, should have been suppressed.

[Emphasis by Court; Footnotes, some citations omitted]

DISSENT'S ANALYSIS: (Excerpted from dissent opinion)

I dissent from the court's disposition of this case. In my view, it should be remanded to the trial court for a hearing to determine whether the officer reasonably believed that the house guest had authority to consent to entry. All this court knows about the circumstances of the entry is that the arrest occurred very early in the morning and that the person who consented to entry was asleep at the time the officer knocked on the door looking for Ryland. Both of these circumstances are consistent with his being an occupant of the house and, under State v. Williamson, 42 Wn. App. 208 (1985)**[Feb. '86 LED:07]**, a person who can consent to the officer's entry. However, at the suppression hearing in this case, neither the trial court nor the parties considered whether the house guest had apparent authority to consent to the officer's entry.

> In addition, the United States Supreme Court announced its decision in Illinois v. Rodriguez, 497 U.S. ___ (1990), several months after the hearing below. In Rodriguez, the Supreme Court held that the trial court should determine whether "the facts available to the officer at the moment [of entry] . . . 'warrant a man of reasonable caution in the belief' that the consent party had authority over the premises." Because the Rodriguez court could not ascertain from the record what the trial court's evaluation of this question would be, it remanded for a hearing to make this determination. This court should do the same think here. We simply do not have a record on which to rule out application of the apparent authority doctrine adopted in Rodriguez. It is imprudent to reverse a conviction under these circumstances.

[Some citations omitted]

LED EDITOR'S COMMENT:

The prosecutor's office has filed a Petition for Review in this case. We hope that the prosecutor's office is aware of what Professor LaFave has to say on this situation. Albeit quite liberal like virtually all American law professors, Professor LaFave, as the author of the leading treatise on Search and Seizure which is often cited by our appellate courts, should always be checked on Search and Seizure issues. Occasionally, as here, his views favor the State's position, and his analysis always incorporates the significant Fourth Amendment cases. LaFave declares:

> **[N]ote must be taken of a case . . . where the guest is actually present inside the premises at the time of the giving of the consent and the consent is merely to a police entry of the premises into an area where a visitor would normally be received. There is sound authority that, at least when the guest is more than a casual visitor and "had the run of the house," his lesser interest in the premises is sufficient to render that limited consent effective. It may also be suggested that the apparent authority doctrine may come into play in these circumstances, so that the police are entitled to assume without specific inquiry as to that person's status that one who answers their knock on the door has the authority to let them enter.**

Section 8.5(e), pp. 310-311 (footnotes omitted).

OFFICER'S PRIOR DIRECTIVE TO A PERSON TO STAY OUT OF AN AREA DOESN'T PROVIDE PROBABLE CAUSE TO ARREST FOR TRESPASS IN LATER CONTACT IN THAT AREA

State v. Blair, 65 Wn. App. 64 (Div. I, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On September 1, 1989, Blair was walking into the Roxbury Housing Village (Roxbury Village) when he was stopped and arrested by [a] Seattle Police Officer for criminal trespass. [The officer] searched Blair incident to the arrest and found a plastic bottle containing rock cocaine. The State charged Blair with possession of cocaine in violation of the Uniform Controlled Substances Act, RCW 69.50.401(d). Blair moved to suppress the evidence on the ground that the police lacked probable cause to arrest him. After holding a suppression hearing, the trial court

denied the motion.

> Roxbury Village is a public housing complex owned and operated by the Seattle Housing Authority (SHA). Experiencing problems with drug dealing, drug use, trespassing and other disturbances, the management of Roxbury Village posted signs on each building in the complex stating "No Trespassing -- Any illegal activity or loitering is prohibited in this area. Seattle Housing Authority." The signs are visible from all parking lots and entryways. The SHA also entered into an agreement with the Seattle Police Department (SPD) authorizing the SPD to warn and arrest anyone trespassing on the premises. [The arresting officer] testified that the agreement allows him to "admonish" any person who he believes has engaged in illegal activity or who has been arrested on the premises of Roxbury Village. The officer admonishes the person not to return to Roxbury Village or he or she will be arrested for trespassing.
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> On August 8, 1989, [the officer] arrested Blair in a Texaco station parking lot near Roxbury Village for allegedly engaging in a drug transaction. Blair was convicted of possession of narcotics. Prior to that arrest, [the officer] saw Blair participate in what he believed was a drug transaction on the premises of Roxbury Village. [The officer] did not investigate that incident because there were several men present and he had no backup. During the August 8 arrest, [the officer] admonished Blair not to return to Roxbury Village. On September 1, 1989 Blair was walking into Roxbury Village with a friend when [the officer] pulled up in his patrol car and directed Blair to get in the car. Blair testified that he responded, "But I'm not doing anything, I'm just coming to get my hair braided." [The officer] did not attempt to find out whether Blair was on the premises for a legitimate purpose. He placed Blair under arrest and searched him.
>
> Blair testified that on September 1, 1989, he was going to visit a girl named Freda who had agreed to braid his hair. He indicated on a diagram of the housing complex which unit Freda lived in, but he was not sure of the unit number. He also did not know Freda's last name. Blair believed that she may have been staying with the family who lived in the unit. The Roxbury Village manager, Virginia Bock, testified that Freda's name did not appear on his list of residents. She acknowledged, however, that the list only includes residents, not the names of guests staying with residents.

[Footnote omitted; bracketed language added by LED Editor]

ISSUE AND RULIING: Did the Seattle officer have probable cause to arrest Blair for trespassing? (ANSWER: No) Result: King County Superior Court ruling denying suppression reversed. Status: decision final.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Former SMC 12A.08.040 provides in part:

> A. A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains in a building when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

> B. A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

Under the ordinance, if a person is not licensed, invited or otherwise privileged to enter or remain on the premises of Roxbury Village, he or she is guilty of second degree criminal trespass.

Blair first contends that [the officer] could not have had probable cause to arrest him for trespassing because he was arrested on a public sidewalk where he had every right to be. Blair apparently believes that sidewalks within the housing project are open to the general public because the project is owned and managed by the City of Seattle, a public corporation. See RCW 35.82.030.

The State may control the use of its property so long as the restriction is for a lawful, nondiscriminatory purpose. Here, the SHA is legislatively mandated to provide decent, safe and sanitary dwellings for low income individuals. RCW 35.82.020(9). The SHA's policy of restricting access to its property by excluding those engaging in illegal activities on the premises serves only to further this legislative mandate and therefore cannot be seen as discriminatory. Moreover, the SHA is not operating the apartment complex for the general public. Rather, it is providing housing for the residents of the complex. Thus, in attempting to discourage criminal activity by posting no trespassing signs, the management of Roxbury Village is acting no differently than management of a privately owned apartment complex would act.

. . .

Having decided that the SHA can legally restrict access to its property, the next question is whether [the officer's] prior admonishment not to return, coupled with Blair's return to the restricted premises, constituted probable cause to arrest Blair for criminal trespass. Police have probable cause to arrest when "there is reasonable ground for suspicion, supported by circumstances within the knowledge of the arresting officer, which would warrant a cautious person's belief that the individual is guilty of a crime." It is an affirmative defense to criminal trespass that "[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain". Thus, whether [the officer] had probable cause to believe that Blair was committing a crime depends on whether the circumstances known to the officer indicated that Blair was not on the property for legitimate purposes.

[The officer] arrested Blair as he was entering Roxbury Village. He had not seen Blair loitering on the property or exhibiting other behavior which might lead a reasonable person to believe that Blair was not on the property to visit a resident or guest on the day of the arrest. [The officer] simply drove up to Blair and ordered him into the police cruiser where he arrested him. Had [the officer] taken a moment to ask Blair where he was going and for what purpose, he could have determined whether Blair was in fact visiting a friend or was trespassing. [COURT'S FOOTNOTE: The trial court found that Blair was not on the premises on September 1 to visit anyone named Freda, and that in all probability, Freda did

not reside at Roxbury Village.]

> Because he knew Blair did not live in Roxbury Village, had admonished Blair not to return and had arrested him nearby for a drug transaction, [the officer] had an articulable suspicion that Blair might be trespassing on September 1. Based on this information, [the officer] could properly stop Blair, ask him why he was on the premises, and investigate to see if his purpose for being there was in fact legitimate. However, the fact that the officer had told Blair not to return to the premises does not, in itself, create probable cause for arresting him on the charge of criminal trespass.
>
> Nor can we find that the officer's conduct in this case was justified on any other ground. The fact that the officer had a basis for believing that Blair was trespassing did not give rise to reasonable suspicion that he was in possession of narcotics. During a Terry stop, a limited search for weapons is warranted when the investigating officer has reason to believe the suspect is armed and dangerous. Here, however, the officer had no reason to suspect that Blair might be armed and dangerous. Therefore, had [the officer] conducted an investigatory stop, a search incident to the stop would not have been justified. [COURT'S FOOTNOTE: Of course, had the officer concluded after questioning Blair and investigating his story that he was not there for any legitimate purpose, the officer would have had probable cause to arrest Blair, and the search incident to the arrest would have been lawful.]
>
> Because [the officer] lacked probable cause to arrest Blair, the trial court should have suppressed the cocaine seized in the search incident to the arrest. The order denying suppression of the evidence is reversed.

[Some footnotes, citations omitted; bracketed language added by LED Editor.]

SEARCH WARRANT FOR CONTROLLED SUBSTANCES MAY BE EXECUTED IN 10 DAYS

State v. Thomas, 65 Wn. App. 347 (Div. I, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On March 8, 1989, the Everett District Court issued a search warrant for Andrew Thomas's residence. The search warrant directed that within 10 days the police were to seize:
>
> > ALL COCAINE THERE FOUND TOGETHER WITH THE VESSELS IN WHICH THEY ARE CONTAINED, AND ALL IMPLEMENTS, FURNITURE AND FIXTURES USED OR KEPT FOR THE ILLEGAL MANUFACTURE, SALE, BARTER, EXCHANGE, GIVING AWAY, FURNISHING OR OTHERWISE DISPOSING OF SUCH ILLICIT DRUGS AND CONTROLLED SUBSTANCES, PAPERS INDICATING OCCUPANCY OR OWNERSHIP OF RESIDENCE, SALES TRANSACTIONS AND THOSE ITEMS COVERED UNDER RCW 69.50.505.
>
> Nine days later, on March 17, 1989, the warrant was executed whereby one-half

ounce of cocaine was seized. [COURT'S FOOTNOTE: While the search was in progress, Thomas arrived in a motor vehicle. The officers arrested Thomas and searched the vehicle which resulted in seizure of the cocaine. A scale containing cocaine residue and a pistol were also seized from the residence.]

Thomas was charged with possession of cocaine with intent to deliver. Prior to trial he moved to suppress the seized evidence. The court granted the motion finding that under RCW 69.50.509, a search warrant for controlled substances must be executed within 3 days. The State moved for reconsideration, arguing that RCW 69.50.509 has been superseded by CrR 2.3. The court denied the State's motion.

ISSUE AND RULING: Does RCW 69.50.509 require that a search warrant for controlled substances be executed within 3 days or does the general 10-day rule for execution of search warrants apply? (ANSWER: The court rules establish 10 (ten) days as the time period for execution of all search warrants). Result: Snohomish County Superior Court suppression order reversed; case remanded for trial. Status: petition for review pending.

ANALYSIS: (Excerpted from Court of Appeals ruling)

We first decide whether the trial court erred in finding RCW 69.50.509 mandates that a warrant to search for controlled substances must be executed within 3 days of warrant's issuance. CrR 2.3(c) sets the time limit for execution of a search warrant:

> [The warrant] shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place or thing named for the property or person specified. It shall designate to whom it shall be returned.

[Court's emphasis] See also CrRLJ 2.3(c). RCW 69.50.509, on the other hand, sets the time limit for return of the warrant:

> If, upon the sworn complaint of any person, it shall be made to appear to any judge of the superior court, district court, or municipal court that there is probable cause to believe that any controlled substance is being used, manufactured, . . . or otherwise disposed of or kept in violation of the provisions of this chapter, such judge shall . . . issue a warrant directed to any law enforcement officer of the state, commanding him or her to search the premises designated and described in such complaint and warrant, and to seize all controlled substances there found, together with the vessels in which they are contained, and all implements, furniture and fixtures used of kept for the illegal manufacture, sale, . . . or otherwise disposing of such controlled substances, and to safely keep the same, and to make return of said warrant within three days, showing all acts and things done thereunder. . ..

[Court's emphasis]

We find that the trial court erred in finding RCW 69.50.509 controls the time period for execution of a warrant to search for controlled substances. CrR 2.3 commands

that the search take place within 10 days and clearly makes a distinction between return and execution. RCW 69.50.509 commands that when the items to be seized consist of controlled substances, the warrant must be returned within a 3-day period (presumably this requirement is to avoid the appearance of impropriety or the tampering of evidence). In other words, contrary to the trial court's ruling, RCW 69.50.509 controls the return of a warrant after its execution, not the execution itself.

We also find that even if we were to assume there was a conflict between CrR 2.3 and RCW 69.50.509 in that the rule and the statute are inconsistent, CrR 2.3 would supersede any inconsistent restrictions set out in RCW 69.50.509. The issuance of a search warrant is "a matter of procedure". State v. Fields, 85 Wn.2d 126 (1975). The Washington Supreme Court "has the inherent power to govern court procedures." "Where a rule of court is inconsistent with a procedural statute, the court's rulemaking power is supreme."

The judgment finding that the warrant was not timely executed is reversed.

RADIO CHECK FOR WARRANTS VALID FOLLOWING COMPLETION OF TERRY STOP

State v. Madrigal, 65 Wn. App. 279 (Div. III, 1992)

FACTS AND PROCEEDINGS: (Excerpted from Court of Appeals ruling)

Yakima Police Officer Rodney Light was on routine patrol at approximately 6 p.m. on November 19, 1989. A few hundred feet from the Yakima County Courthouse, he observed a "heated argument" between a man, later identified as Mr. Madrigal, and a woman, known to Officer Light as Tia Williamson. He heard the couple yelling more than half a block away. Officer Light concluded Mr. Madrigal's body language was overpowering Ms. Williamson. Believing as assault was about to occur or had occurred or that a domestic quarrel was ensuing, Officer Light stopped his patrol vehicle and approached the couple. Ms. Williamson was crying. The couple continued to yell at each other. Officer Light asked Ms. Williamson if there was a problem. She said no. Officer Light asked Mr. Madrigal for identification and told Ms. Williamson she was free to go. Mr. Madrigal handed over his Washington ID card. Officer Light ran a warrant check using a portable radio while he stood with Mr. Madrigal. Within 2 minutes, Officer Light was informed of three outstanding misdemeanor warrants for Mr. Madrigal's arrest.

Officer Light advised Mr. Madrigal he was under arrest, handcuffed him, and conducted a pat-down search. He found two paper bindles in Mr. Madrigal's right front pants pocket. Officer Light recognized that the bindles were folded in a manner consistent with transporting narcotics. He opened the bindles and found a white powdery substance, later determined to be cocaine.

Mr. Madrigal moved to suppress the cocaine contending: (1) there were insufficient facts to justify an investigatory stop; (2) the stop was overly intrusive; and (3) the opening of the bindles was an unreasonable search. The court denied the motion, ruling the search was incident to a lawful arrest because the officer was operating "under the aura of some illegal activity, either an assault, [or] a potential assault."

The court found articulable facts to justify the investigative stop. Therefore, it concluded the subsequent warrant check, arrest and search were justified. Mr. Madrigal waived his right to a jury trial. The court found him guilty of possession of cocaine.

ISSUES AND RULINGS: (1) Was the initial Terry stop justified by a reasonable suspicion of criminal activity? (ANSWER: Yes); (2) Was the radio check for warrants following the investigatory stop lawful? (ANSWER: Yes) Result: Yakima County Superior Court conviction for possession of a controlled substance affirmed. Status: decision final.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Reasonable Suspicion

Police may make an investigative stop even though there is not probable cause to believe a suspect is involved in criminal activity. When making an investigatory stop, an officer is required by the Fourth Amendment to have a reasonable suspicion, based on objective facts, that an individual is involved in criminal activity. When officers have a reasonable suspicion, they may stop the suspect, identify themselves and ask the person detained for identification and an explanation of his or her activities.

State v. Ellwood, 52 Wn. App. 70 (Div. I, 1988)**[Nov. '88 LED:05]** is not controlling. There, the defendant was stopped because of his presence in an area with a history of burglaries. The officer did not observe any suspicious conduct. Officer Light had a reasonable and articulable suspicion of criminal activity. He saw and heard Mr. Madrigal engaged in a loud altercation with Ms. Williamson. The stop was justified.

(2) Post-seizure Radio Check

After a lawful investigatory stop, an officer may temporarily detain a suspect pending the results of a police headquarters radio check. Outstanding warrant checks during valid criminal investigatory stops are reasonable routine police procedures.

Mr. Madrigal's reliance on State v. DeArman, 54 Wn. App. 621 (1989)**[Nov. '89 LED:19]** is misplaced. In DeArman, an officer observed an automobile stopped in an intersection. Believing it to be disabled, the officer approached. The automobile moved through the intersection; the officer then knew the vehicle was not disabled. Nevertheless, he became "suspicious", approached the vehicle and asked the driver for identification. The court held that once it became apparent the automobile was not disabled, the officer had no reason to proceed with a stop. A generalized suspicion did not justify the stop.

The facts here are distinguishable. Officer Light approached not because he was

"suspicious", but because Mr. Madrigal was involved in a heated argument with a woman on a public street. Mr. Madrigal's body language was overpowering Ms. Williamson. As the officer approached, the couple continued to yell. An investigative stop was justified. The duration of the warrant check was only about 2 minutes. It did not unreasonably extend the initial contact.

[Some citations omitted]

DISSENT:

Judge Thompson dissents, arguing that the justification for the seizure dissipated when the officer determined that no assault had occurred, and that thereafter the officer had no authority to hold the suspect while the radio check was ongoing.

LED EDITOR'S COMMENT: According to Professor LaFave, at section 9.2(f) of his 4-volume treatise on Search and Seizure, the case results are mixed on the authority of police to hold a suspect in order to start and complete a check after completing a Terry stop or traffic stop. We suggest that the cases indicate that if it is at all possible under the circumstances, officers should start the radio warrant check before completing the Terry or traffic stop, so that the warrant check can be completed at about the same time that the traffic stop of Terry stop is completed.

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NEXT MONTH

Among other recent court decisions of interest, the November 1992 LED will digest State v. Solberg, 66 Wn. App. 66 (Div. I, 1992). In Solberg the Court of Appeals has ruled that it was unlawful for officers to make a warrantless, probable cause arrest of a suspect who had voluntarily stepped onto his porch to talk to the investigating officers. We believe that the Court of Appeals in Solberg has completely misread the case law under Payton v. New York, and we will review that case law in the November LED.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.